APPENDIX A.

Order of Supreme Court of Pennsylvania on Petition for Allowance of Appeal.

2/13/62. Petition denied.

PER CURIAM.

APPENDIX B.

Opinion of Superior Court of Pennsylvania.

(Filed: November 16, 1961)

By Montgomery, *J.*

The three appellants were indicted separately under section 718 of the Act of June 24, 1939, P. L. 872, 18 P. S. 4718, and were convicted on the third count only, of unlawfully, willfully, and feloniously using a certain instrument and means, the nature of which instrument and means was unknown, upon certain women with the intent to procure miscarriage of them.

The Commonwealth presented all of the evidence that was offered in the case. All three defendants elected not to testify nor to offer any other evidence on their behalf.

The Commonwealth's evidence discloses the following factual situation. On the evening of November 21, 1958, the Pennsylvania State Police, armed with a search warrant, stationed themselves near a house located in Heidelberg Township, York County, observing the approach of two cars, whose drivers and passengers entered the house. A few minutes after these people entered the house the State Police entered by using a key which they had previously obtained from the owner of the premises and, upon entering, observed appellant Campbell sitting on a stool beside an operating table and dressed in a white surgical gown and cap, a pair of rubber gloves on his hands, and a surgeon's mask tied around his face.

Appellant Ensor was found removing a white uniform similar to that worn by nurses. Appellant Lang was sitting in an adjoining room in ordinary street clothes. In the several rooms of the house two women were found in beds, another one sitting on a bed dressed in her slip, and two

others fully clad. In the room where appellant Campbell was seated, in addition to the operating table, the officers found various surgical instruments, gauze, drugs, and other medical items.

The two women who were found occupying the beds, and the one in her slip, were taken to the office of Dr. Thomas Hart, where they were examined by him. His examination disclosed evidence of surgical procedure in the region of the reproduction organs of two of the women, Nancy Reese and Elizabeth Troyer, but not on the third girl, Hazel Reed. One of the other women, Barbara Perry, a Commonwealth witness, had consulted Dr. Hart as a private patient sometime previously. Dr. Hart had diagnosed that she was in a pregnant condition, but it was not contended that any abortion had been performed upon her.

Appellants were all interrogated that evening, at which time the appellant Campbell signed a written statement in which he said he had been performing surgical procedures upon women for the purposes of inducing abortion or miscarriage, explaining in detail the occurrences of that particular evening, and that he received a fee of $200 for each operation.

Appellant Ensor, in a verbal statement to the police, said that she was employed by Campbell; that she had training as a practical nurse; that her duties were to administer to the general needs of the women who came to the house.

Appellant Lang said that he had heard Campbell was performing abortions; that he was employed by Campbell to work on his farm, and that on the particular evening in question he had been instructed by Campbell to pick up and transport two of the women to the house, using back country roads.

Appellants' first contention is that they were denied their constitutional rights to a fair trial by the failure of the Commonwealth to produce the alleged victims of the abortions, and by the withholding of evidence that they would not testify for the Commonwealth. Although the

Commonwealth must try a case fairly, and the district attorney is not a "vindictive seeker for vengeance", the calling of witnesses is within the discretion of the district attorney under the general supervision of the trial judge. The Commonwealth is not obliged to call all eyewitnesses in a criminal prosecution, nor a particular eyewitness, where the district attorney has reason to believe that the eyewitness is unreliable. Commonwealth v. Horn, 395 Pa. 585, 150 A. 2d 872; Commonwealth v. Palermo, 368 Pa. 28, 81 A. 2d 540; Commonwealth v. Repyneck, 181 Pa. Superior Ct. 630, 124 A. 2d 693; Commonwealth v. Lomax, 196 Pa. Superior Ct. 5, 173 A. 2d 710.

In the instant case these women were not victims in the adverse sense of the word but, rather, individuals who had voluntarily undertaken to have an abortion performed upon them. Such a person is described not as an accomplice or particeps criminis, but *rather* as the victim. Snyder Appeal, 189 Pa. Superior Ct. 13, 149 A. 2d 666; Commonwealth v. Sierakowski, 154 Pa. Superior Ct. 321, 35 A. 2d 790. Under these circumstances their reliability in testifying would certainly be questionable. Subpoenas were issued for three of the women, two of which were not honored, and the third of which could not be served because the witness could not be found. The defense was fully aware prior to the trial and again informed the first day of the trial that the Commonwealth would not call these witnesses if they did not voluntarily appear upon subpoena; and there was nothing to prevent the defense from calling them if their testimony was to be adverse. The lower court did inform the jury that they could consider the testimony of the two witnesses who were served and failed to appear to be adverse to the Commonwealth, but refused to instruct that the witness who could not be found would also be adverse. It is argued that the court's refusal to so charge as to the third one was prejudicial error. We see no error in this unless it be in giving the defendants the benefit of having the jury draw an unfavorable inference from the absence of the two

girls who were served. These witnesses were available to both the Commonwealth and the defendants. The Commonwealth had no particular control over any of them; and it has been pointed out previously that such persons might reasonably be expected to testify for the defendants and not the Commonwealth. Under these circumstances the rule has no application. Commonwealth v. Black, 186 Pa. Superior Ct. 160, 142 A. 2d 495.

Aside from the statements of the defendants, other evidence presented by the Commonwealth shows unequivocally that two abortions, or attempts to commit two abortions, had taken place. We conclude therefore, that there was no abuse of discretion on the part of the trial judge in concluding the cases without insisting on the appearance of these witnesses, and that there has been no violation of any of defendants' rights. We think it also significant that the defendants, at no time during the trial, requested the presence of these witnesses or the enforcement of the subpoenaes that had been served upon them.

Appellants further contend that they were deified their constitutional rights by the lower court's refusal to permit counsel to cross-examine on the question of the probable cause for issuance of the search and seizure warrant.

At the time of the trial and prior to the recent decision of the Supreme Court of the United States in Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081, which prohibited state courts from admitting into evidence any matter which was obtained by an unlawful search and seizure, Pennsylvania had as its rule that even though a search warrant was illegally issued, it did not affect the admissibility of evidence obtained under it. Consequently, when the court below ruled that the defense counsel could not cross-examine on the question of probable cause or issuance of a search warrant, it correctly applied the existing law. Appellants admit this, but claim that in light of the complete change in the law the lower court should be reversed and a new trial granted. This contention would be meritorious if illegality in obtain-

ing the search warrant had been shown. However, there is nothing in the record to show illegality. During the course of the trial, counsel for defense, in his cross-examination of the police officer who obtained the warrant, indicated that he was not attacking its legality but was merely attempting to show bias. The officer indicated that the complaint was made on behalf of the owner of the premises. The questions of counsel elicited no showing of illegality, or for that matter bias or prejudice, in the obtaining of the search warrant. Therefore, the change in the law effected by Mapp v. Ohio (supra) is not applicable.

The appellants further contend that the lower court committed prejudicial error in its ruling on the admissibility of certain evidence. Firstly, the court's admission of a large quantity of photographs and alleged abortion paraphernalia was cumulative. The extent or size of the quantity of evidence produced and admitted cannot be said to be prejudicial unless it was so repetitive that it could possibly sway the jury in its determinations. The Commonwealth followed up each item with testimony and attempted to coalesce them, presenting the complete picture to the jury. As the learned judge in the court below pointed out, while it may not have been necessary for the Commonwealth to introduce all of the exhibits that it did, such as everyday household items, the appellants were not prejudiced thereby.

Secondly, appellants objected to the admission of posed photographs of appellant Campbell, claiming that when the police photographers had Campbell submit to various poses including the raising of his surgical mask, it constituted a re-enactment of the crime. In Commonwealth v. Johnson, 368 Pa. 139, 81 A. 2d 569, relied upon by the appellants, it was held to be error for the court to admit into evidence photographs for which the defendant had been made to pose at the instance of the police. However, we are in agreement with the lower court that the instant case is not factually similar to the Johnson case and can be readily distinguished. In the Johnson case the defendant was not apprehended for

six months after the crime, and when taken to the scene of the crime he posed for certain photographs indicating his activities in the commission of the crime. Here, the photographs were taken immediately after the officers had entered the premises where they found appellant Campbell seated in the position shown in the photograph; and evidence indicated he had remained in this position. The only thing the police requested was that he replace his surgical mask in the position it was when they had entered.

Admission of photographs and their use rests largely in the trial judge's discretion. Commonwealth v. Sydlosky, 305 Pa. 406, 158 A. 154; Commonwealth v. Winter, 289 Pa. 284, 137 A. 261; Commonwealth v. White, 160 Pa. Superior Ct. 522, 52 A. 2d 360. In Commonwealth v. Carelli, 281 Pa. 602, 127 A. 305, it was held that where a defendant actively participates in the reproduction of the circumstances and of the location of the parties at the time and place of the crime, a photograph then made is admissible in evidence although taken more than one month after the occurrence.

In the Johnson case the Court did not distinguish the Carelli case or recite any other precedents. The basis for its holding of inadmissibility was that such photographs of the defendant, pointing to what he had actually done, would be likely to impress a jury to such an extent as to virtually preclude the possibility of acquittal. However, in the Carelli case, where the photograph showed the position of the defendant and the setting at the time of the crime, and even more so in the present case where the photographs merely show the scene as it was at the time of the arrest, the pictures themselves do not portray a re-enactment of the commission of the crime but rather elucidate and corroborate the testimony. Error will not be predicated on the admission of such exhibits, unless there is a flagrant abuse of discretion, and none is apparent here.

Thirdly, the appellants contend the admission of the opinion-evidence of the physician-witness was error. It is clear from the testimony that the physician-witness was not

merely testifying as an expert witness who would be entitled to give his opinion on an assumed state of facts, but he was testifying as to what his personal examination of the women disclosed when they were brought to him by the police. His examination of the women was not made for the sole purpose of qualifying him as a witness, but also for medical reasons to determine whether their health was affected. He administered medicine to them and prescribed further medications. His testimony consisted of a description of the physical condition of the women, stating certain opinions based on his examination. Under these circumstances, he was clearly competent to give his medical opinion. Commonwealth v. Neill, 362 Pa. 507, 67 A. 2d 276.

Fourthly, the appellants contend that it was prejudicial error for the lower court to fail to charge the jury on the identity of the victims of the abortions, since the Commonwealth's testimony indicated that there were five women found on the premises and that only two of them, in the opinion of the physician, had been aborted. The identity of the victims was clearly in evidence from the testimony of the police officers and the physician who saw all of the alleged victims. Although appellant Campbell did not identify the victims, the physician testified as to the abortions having been performed with no interim period having passed between the time they were picked up in the presence of Campbell and the time he examined them. It should have been clear to the jury from the testimony and from the charge of the court exactly what had happened. If there was any error in the lower court's failure to identify the victims, it certainly cannot be held to be prejudicial to the appellants.

Other alleged errors in the charge, in addition to those previously discussed, relate to (1) the effect of the testimony of Dr. Hart; (2) the effect of the testimony of Barbara Perry. Particular objection is made to the sentence, "Now, if you believe that testimony (relating to Dr. Hart's finding of evidence of surgical interference on two of the

girls but not on the third), . . . then all three of these defendants would be guilty of the offense." A reading of the charge clearly shows that this sentence alone is taken out of context and must be read in connection with other parts of the charge. Dr. Hart was referring to his examinations. As to the Reed girl, who showed no evidence of surgical action, the court said, ". . . no conviction of any of these defendants could be sustained with regard to anything that allegedly was done with regard to her. . . . With regard to the other two, of course, you have entirely different situation." Then he proceeds to make the statement previously mentioned to which defendants object, which must be read in connection with other parts of the charge describing how persons other than the one who actually committed or attempted the abortion may become criminally involved. We think the charge fully and correctly informed the jury on this point, particularly with the additional information given to it following this objection.

Defendants' other objection to the charge, in relation to the testimony of Dr. Hart, concerns the failure of the trial judge to describe the doctor's conclusion after examination as an opinion and not a fact. In view of the other parts of the charge placing credibility of the witnesses and the weight of the evidence in the hands of the jury to resolve, and the further fact that no specific exception was taken and no request made on this point, we conclude that it was not fundamental error, if error at all, as to be covered by a general exception. Defense counsel objected to the doctor giving his opinion, but not to the charge as to the effect. We have previously discussed his objections to the evidence.

The objection to the charge as it relates to the testimony of Barbara Perry concerns the failure of the trial judge to limit her testimony to the question of intent. No request was made for such an instruction. In fact, no mention of the testimony of this witness was made in the charge. Inadequacy of instruction is insufficient. A party may not

remain silent and take his chances on a verdict and then, if it is adverse, complain of mere inadequacy which could have been corrected. Koenig v. Flaherty, 383 Pa. 187, 117 A. 2d 719. We do not conclude the inadequacy in this case to be fundamental.

It is further contended that the sentence imposed upon appellant Lang was incorrect. The court sentenced the appellant, Charles William Lang, to undergo imprisonment in the York County jail for a period of eight months, and to pay the costs of prosecution.

The Penal Code on Abortion, Act of June 24, 1939, P. L. 872, § 718; 18 P. S. 4718 provides that a defendant:

> ". . . upon conviction thereof, shall be sentenced to pay a fine not exceeding three thousand dollars ($3,000), or undergo imprisonment by separate and solitary confinement at labor not exceeding five (5) years, or both."

The Act of June 19, 1911, P. L. 1055, as amended, 19 P. S. § 1057 provides:

> "Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a State penitentiary, shall be sentenced to imprisonment therefor in any penitentiary or other institution of this State, or in any county or municipal institution, the court, instead of pronouncing upon such convict a definite or fixed term of imprisonment, shall pronounce upon such convict a sentence of imprisonment for an indefinite term: Stating in such sentence the minimum and maximum limits thereof; and the maximum limit shall never exceed the maximum time now or hereafter prescribed as a penalty for such offense; and the minimum limit shall never exceed one-half of the maximum sentence prescribed by any court:"

The appellants contend that the maximum sentence that could be imposed on Lang legally was a sentence of four to eight months. The maximum sentence in an inde-

terminate sentence is the real sentence. Commonwealth ex rel. Monaghan v. Burke, 169 Pa. Superior Ct. 256, 82 A. 2d 337. The lower court had the right under the statute to sentence appellant Lang up to eight months, and since this is the real sentence there is no reason why the judgment should be reversed. However, since the Penal Code makes the crime of abortion subject to imprisonment by separate or solitary confinement at labor, or fine, or both, the sentence should have been an indeterminate one. Where the original sentence is illegal or erroneous we may remit the record to the lower court for proper sentence, and that court may proceed to sentence the defendant anew in proper form and according to law. Commonwealth v. Downer, 161 Pa. Superior Ct. 339, 53 A. 2d 897. Commonwealth ex rel. Monaghan v. Burke, supra.

The judgments of sentence of Charles Christopher Campbell and Thelma Adele Ensor are affirmed and they are ordered to appear in the court below at such time as they may be there called, and that they be by that court committed until they have complied with their sentences or any part thereof that had not been performed at the time the appeal was made a supersedeas.

The judgment of sentence of Charles William Lang is affirmed and it is directed that the record be remanded to the Court of Oyer and Terminer of York County for correction of the sentence to include a minimum and the defendant, Charles William Lang, is ordered to appear in the court below at such time as he may be there called, and that he be by that court committed until he has complied with his sentence or any part thereof that had not been performed at the time the appeal was made a supersedeas.

APPENDIX C.

Opinion and Order of the Court of Oyer and Terminer of York County [Appeals Nos. 32, 33, 34].

In these three cases the defendants were separately indicted under Section 718 of the Act of 1939, P. L. 872, 18 P. S. 4718. Each bill of indictment was drawn in three counts. The first count charged that the defendant did unlawfully, wilfully and feloniously administer certain women supposed to be pregnant a certain drug and substance with intent to procure the miscarriage of the women mentioned in the indictment. The second count charged that the defendant did unlawfully, wilfully and feloniously administer to the same named women certain poison drugs and substance with intent to procure a miscarriage of the women, and the third count alleged that the defendants did unlawfully, wilfully and feloniously use a certain instrument and means, the nature of which instrument and means was unknown, upon the women with the intent to procure miscarriage of them. The charges in each of the indictments are identical.

The three cases were tried together before a jury, and in each case the jury returned a verdict of not guilty as to the first and second counts of each bill, and a verdict of guilty as to the third count in each bill. Motions for new trial and arrest of judgment in the case of each defendant have been filed, and duly argued. The motions are identical in each case, containing the usual reasons that the verdict was against the evidence, that the verdict was against the weight of the evidence, and the verdict was against the law. The fourth reason is given in each instance wherein objection is taken to the admission of certain evidence. The same reasons are alleged in the motions for new trial and in the motions for arrest of judgment.

The Commonwealth presented all of the evidence that was offered in the case. All three defendants elected not to testify nor to offer any other evidence on their behalf.

From the verdicts it can be said that the jury found the following factual situation. That some time during the months of August or September of 1958 the defendants Campbell and Ensor approached P. L. Diehl, a real estate broker operating in the City of York, for the purpose of renting a house and lot of ground in Heidelberg Township, York County, Pennsylvania, representing themselves as Carrol G. Harrison and Orta Harrison. After some negotiation with Mr. Diehl, these two defendants entered into a lease for the property and entered into possession thereof.

On the evening of November 21, 1958, the Pennsylvania State Police, armed with a search warrant, stationed themselves near the house and first observed two automobiles, one a Cadillac and one a Ford, drive up to the house. The occupants of the Cadillac entered the house and remained there. The Ford left after discharging its passengers, who also entered the house, and about an hour later returned, at which time at least two women and the driver left the car and went into the house. A few minutes after these people entered the house the State Police entered by using a key which they had previously obtained from the owner of the premises, and upon entering they observed the defendant Campbell sitting on a stool in a room beside a table similar to that used by medical doctors for patients to lie upon during examinations and minor surgical procedures, dressed in a white gown; a white surgeon's cap; a pair of rubber gloves were on his hands, and a surgeon's mask was tied around his face. The defendant Ensor was found in the bathroom in the act of unbuttoning a white uniform similar to that worn by nurses, apparently preparatory to removing the uniform. The defendant Lang was found sitting in a chair in ordinary street clothes in a room referred to as a living room. In three other rooms there was

found a bed in each room occupied by a woman, and in another room was found another woman dressed only in a slip. In the room where the defendant Campbell was seated in addition to the table above mentioned, there were various surgical instruments, kidney pans such as are found in medical offices and hospitals, packages of sterile gauze and certain drugs and many other items that are normally found where medical practices are engaged in.

The officers spoke with defendant Campbell as well as defendant Ensor. All three defendants were taken to the State Police Barracks, all of the items found in the house were catalogued by the police and tagged with identification markers. The three girls who were found occupying the beds were taken to the office of Dr. Thomas Hart where they were examined by him. His examination disclosed that two of the girls showed evidence of surgical procedures in the region of the reproductive organs, and that these two girls had had inserted into the uterus a tampon about five or six inches in length and about one-half to three-quarters inch in diameter. The third girl was examined, but this examination disclosed no evidence of surgical procedure having been followed in her case. The fourth girl it developed had consulted Dr. Hart as a private patient some time prior to this, at which time she had given him an incorrect name to indicate that she was married, when in fact it later developed she was not married. At that time he had diagnosed that she was in a pregnant condition, that when she entered the premises she was asked by the defendant Ensor how long she had been pregnant, to which she replied about three months, that the defendant Ensor then instructed her to remove all of her clothing except the slip and administered a shot of some kind with a hypodermic needle in her leg. The defendants were all interrogated at the State Police Barracks later that evening, at which time the defendant Campbell signed a written statement in which in substance he said he had been performing surgical procedures upon women for the purpose of induc-

ing abortion or miscarriages and that he received a fee of $200.00 for each operation. The defendant Ensor in a verbal statement to the police said that she was employed by Campbell and that she had had training as a practical nurse, and that her duties were to administer to the general needs of the girls who came to the house. The defendant Lang said that he had heard that defendant Campbell had been performing abortions, that he was employed by Campbell to work on his farm, and that on the particular evening in question he had been instructed by Campbell to go to a drive-in eating place located along the Lincoln Highway a few miles west of York to pick up a woman, and to pick up another woman at a tavern located a few miles from the house in Heidelberg Township, and to transport these two women to the house, and to use back country roads in going to the house.

Certainly if the jury believed this testimony, which from the verdict it is evident they did, there was ample evidence from which they could find all three of the defendants guilty of the third count in these bills of indictment.

In his brief, counsel for the defendants discusses a number of questions, contending that errors were committed in the admission of certain evidence. I shall discuss these in the order raised in the brief.

The first question relates to the admission of many of the exhibits that were offered in evidence. He makes a general objection to the volume of the exhibits, and secondly to the fact that many of the exhibits represented simple household items that would normally be found in almost any private dwelling. While it may not have been necessary for the Commonwealth to introduce all of these exhibits, we do not feel that the defendant was unduly prejudiced thereby, particularly in the light of his very frank confession that he had been engaged in this nefarious conduct, so far as the defendant Campbell is concerned and also in the light of the statements made by the other two defendants which indicated clearly that they were a part and parcel of the whole

operation. Specific objection is made to one photograph which was offered. The photographer for the State Police snapped a picture of the defendant Campbell seated on the stool beside the table that is referred to in the testimony throughout as the "operating table" wearing the costume hereinbefore described. After this picture was snapped, he asked Campbell to pull the surgical mask up over his face so that it would be in the same position it was when the officers first entered the premises, he having in the meantime pulled it down below his face and had it tied around his neck. He did this, and the photograph was snapped so that he would appear as he did when the officers entered except for the fact that at the time of their entry he was wearing the rubber gloves, but at the time this second photograph was taken he had removed the rubber gloves and they were lying on the table beside him.

Counsel contends that this constituted a re-enactment of the crime which unduly prejudiced the defendant Campbell, and relies for his authority on the *Com. v. Johnson*, 368 Pa. 139. There, Johnson was charged with murder wherein the death resulted from a train wreck caused by his tampering with the rails of the railroad. Some six months after the accident occasioned by his tampering he was apprehended in South Carolina and returned to Pennsylvania and taken to the spot where he had tampered with the railroad tracks, at which time two photographs were taken, one showing him pointing to the place on the rail where a section of it had been removed, and another showing him pointing to the window of a tool shed. The court without referring to any prior decisions, did say in this case that these photographs were improper. "We do not think that the instant case is similar to that one because here the photographs were taken very shortly after the officers had entered the premises and found Campbell seated in the spot where the photograph was taken and the evidence indicates he had remained in this spot all the time up until the taking of the photograph and that the only thing the police asked

was that he manipulate the surgical mask into the position that it was at the time they originally entered the premises. We think that this clearly comes within the ruling of the Supreme Court in *Com. v. Carelli*, 281 Pa. 602. This was a murder case where the killing had taken place in a saloon. Some time later, it does not appear how much later, the police took the defendant and his fellow criminals to the saloon where they were asked to take the same position they occupied at the time of the murder, and photographs were taken. Mr. Justice Simpson said of this: "Objections made to the admission of photographs of the saloon where the murder was perpetrated on the ground they were taken nearly a month after the date of the crime must necessarily fall because they were taken when the defendant and his fellow criminals were themselves showing how the crime was committed in order that the photographer should get an exact reproduction of the saloon and of the location of the parties in it at the date of the murder." We find no error in the admission of this photograph.

With regard to the contention that many of the exhibits consisted of what might be termed ordinary household items, it might be said that although these items were in many instances such as would be found in a normal household, they were also things that very logically would be found in a place where the business of the defendants was being operated such as sheets, pillow cases, blankets, Kleenex and things of that nature. Furthermore, there is no evidence that this property at that time was being used for anything other than the performance of the conduct charged to the defendants. Not a scintilla of evidence was introduced to show this house was used for any normal living purposes.

Counsel then complains that he was not permitted to cross-examine Sergeant Robert Smith of the Pennsylvania State Police as to the source of the information which he had received and which formed the basis of the affidavit he signed in order to obtain the search warrant. He argues

that this should have been permitted in order to show bias or prejudice on the part of the officer. It is not quite clear to the court how the obtaining of a search warrant would show bias on the part of the officer obtaining it, particularly when the officer did testify that he took this action on the complaint of the owner of the property who told him that there seemed to be something going on at the house that was not right. We do not know what other additional information Sgt. Smith may have had, but counsel is very vague in his statements as to how he considered that any alleged irregularity in the obtaining of the search warrant would affect the credibility of the officer's testimony when describing what he found after he entered the premises. Even though the search warrant may have been improper in the first instance, the evidence obtained thereunder would not be subject to objection. *Com. v. Giambrone*, 183 Pa. Super. Ct. 283.

The next objection refers to the admission of the testimony of Barbara Perry. She is the young lady who had consulted Dr. Hart prior to the time of this raid and learned from him that she was pregnant, and also found on the premises that evening. She testified she had gone there for the purpose of being relieved of her pregnancy, and while there is no evidence that she did see the defendant Campbell, she was transported there by the defendant Lang and almost immediately upon her arrival was asked by the defendant Ensor how long she had been pregnant and was instructed by her to remove most of her clothing, and was administered a shot. The evidence clearly discloses the facts from which a jury could find that a conspiracy existed among the three defendants to commit acts of abortion, and certainly the testimony of this girl would be admissible as against all three defendants because it showed acts of at least two of the defendants that were clearly in the furtherance of the unlawful combination and was therefore binding upon all three defendants. The defendants' counsel contends that this testimony tends to show evidence of the

commission of a crime other than that for which the defendant was indicted. There is no question that the crime of abortion was not committed upon this young lady but the evidence is adimissible for the reason above stated, and also could be considered admissible under the principle that evidence showing the commission of other crimes close in the point of time may be received to show the state of mind of the defendant at the time he committed the principal offense. He also objects to the testimony of Dr. Hart on the ground that it constituted expert testimony concerning facts that did not lend themselves to expert evidence. In the first place, while some of Dr. Hart's testimony did require a knowledge of medicine, he was not testifying in the case simply as an expert, but was testifying as to what he himself found upon making a physical examination of the women who were found in the premises at the time the officers got there. His whole testimony consisted of a description of the condition of these women. It is true that he did express certain opinions based on what he himself found, which of course he was clearly competent to do. We find no merit in this objection and counsel has cited no case similar to the problem raised by Dr. Hart's testimony.

He also objects to the refusal of the court to permit Dr. Hart to be cross-examined relative to an asserted hypothetical situation. This developed from a question by defense counsel to the doctor as to whether or not it would have been physicaliy possible for the two women to have inserted the tampons into their own bodies. Dr. Hart expressed his very firm opinion that this act would not have been possible to have been performed by the women themselves in the manner in which it had been done. During this cross-examination, the doctor did make a remark to the effect that no woman in her right mind would do this, even if it were physically possible. Defense counsel then offered to further cross-examine the doctor on whether or not a woman not in her right mind might do this. This the court refused to permit, mainly because there was no evidence

whatsoever that either of the women in question were not in their right minds, and we certainly see no error in excluding this kind of hypothetical testimony.

The defendant also complains that the court did not sustain his demurrers to the evidence. If there was any error in refusing to sustain the demurrers as to the first two counts in the bills of indictment, that has been cured by the jury's verdict. It requires only a brief summary of the testimony that was offered to show clearly that the jury was eminently proper in returning the verdict they did as to the third count in the bill of indictment so far as the defendant Campbell was concerned, at least. The testimony raised a question of fact with regard to the other two defendants, and the testimony, if believed by the jury, certainly justified the verdict, and it would have been clear error to have refused to permit the jury to pass upon this evidence.

Lastly, the defendant contends that the court should have instructed the jury that the testimony of Nancy Lou Reese had she been called, would be presumably adverse to the Commonwealth. She is one of the three girls who were found in the beds in the house at the time of the raid. The evidence showed that she had been a resident of Maryland and that the Commonwealth did a week or two before the trial, make an effort to try to locate her and in fact had at least a week prior to the trial sent a subpoena to the Sheriff at Baltimore County Maryland, where she had lived, according to the information available to the Commonwealth, and that the Sheriff of Baltimore County returned the subpoena with the information that this witness could not be located. The defendant contends that the Commonwealth should have gone to greater effort to locate her. He cites no cases or authority in support of this contention. The evidence does not disclose she was in any way under the control of the Commonwealth. Therefore, under the circumstances the defendant was not entitled to this instruction. We did give him the benefit of the doubt and did so instruct the jury with regard to the testimony of the other two women who

were found in the beds, because the Commonwealth did have information from the Sheriff of Baltimore County that the subpoenas they forwarded to him had been served upon these other girls but the Commonwealth did not take any steps to compel the attendance of these witnesses under the Uniform Attendance of Witnesses Act which is in effect both in Pennsylvania and Maryland. We think that we went pretty far in favor of the defendant in informing the jury that they could consider the testimony of these two witnesses to be adverse to the Commonwealth had they testified.

We find no reason to either grant a motion for a new trial or a motion in arrest of judgment in these cases, and we therefore enter this

Order [Appeals Nos. 32, 33, 34].

And Now, to Wit, this 24th day of April, 1961, it is ordered, adjudged and decreed that the motion for new trial and arrest of judgment both be and are hereby overruled and dismissed, and the defendant is directed to appear before this court on Monday, May 15, 1961, at 9 o'clock A. M. EST, for the imposition of sentence.

An exception is granted to the defendant to the action of the court in this regard.

By THE COURT,

George W. Atkins, *P. J.*